1988

Toshiko Pickhover, an individual and personal representative of the Estate of John W. Pickhover; Catherine Pickhover, an individual, and Gloria Pickhover, an individual v. Smith's Management Corporation, a Utah corporation; Smith's Food King Properties, a Utah corporation; Young electric Sign Company (Appellant); Marveon, Inc. (Respondent); and Image natinal, Inc., an Idaho corporation : Petition for Rehearing

Robert H. Henderson; Snow, Christensen & Martineau; attorneys for respondent.

Michael K. Mohrman; Richards, Brandt, Miller & Nelson; attorneys for appellant.

IN THE UTAH COURT OF APPEALS

880193 CA

TOSHIKO PICKHOVER, an individual and personal representative of the Estate of John W. Pickhover; CATHERINE PICKHOVER, an individual, and GLORIA PICKHOVER, an individual,

Plaintiffs,

Case No. 880193-CA

vs.

SMITH'S MANAGEMENT CORPORATION, a Utah corporation; SMITH'S FOOD KING PROPERTIES, a Utah corporation; YOUNG ELECTRIC SIGN COMPANY (Appellant); MARVEON, INC. (Respondent); and IMAGE NATIONAL, INC., an Idaho corporation,

Defendants.

PETITION FOR REHEARING

An Appeal from the Judgment of the Third Judicial District Court
in and for Salt Lake County, State of Utah
The Honorable Scott Daniels, Presiding

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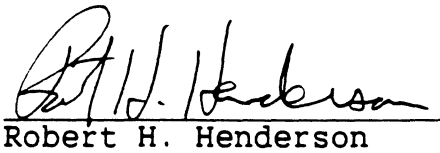
CERTIFICATION BY COUNSEL FOR PETITIONER THAT PETITION IS PRESENTED IN GOOD FAITH AND NOT FOR DELAY

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

DATED this 22nd day of February, 1989.

SNOW, CHRISTENSEN & MARTINEAU

By 

Robert H. Henderson
Attorneys for Petitioner
Marveon, Inc.

INTRODUCTION

Marveon, Inc. petitions the court to rehear only the last two paragraphs of the Court's Opinion filed February 10, 1989, i.e., only that portion of the Opinion which would remand to the trial court for further proceedings on damages.

As is explained more fully below, Marveon petitions the court to rehear this portion of the Opinion, and only this portion of the Opinion, on the grounds and for the reasons that: 1) this portion of the court's opinion is clearly beyond the record on appeal; 2) the issue was not raised nor litigated below and therefore was not briefed on appeal; 3) this Court misconstrues the very case upon which it relies for the remand; 4) there is no reason why a party in breach of contract should get the fortuitous windfall of insurance the non-breaching party to the contract may have obtained; and 5) it makes no sense for a party in breach of contract in one case to pay in full, a second breaching party in a second case to pay one-half, and yet a third breaching party in a third case to pay nothing at all, all depending on whether the non-breaching party in the three cases either provided no insurance, obtained insurance that would contribute 50-50, or obtained purely primary insurance coverage.

ARGUMENT

POINT I

THE RECORD ON APPEAL DOES NOT SUPPORT THE COURT'S REMAND FOR FURTHER PROCEEDINGS ON DAMAGES.

The Utah Supreme Court has consistently and repeatedly held that appeals must be based on the record developed below. Chapman v. Chapman, 728 P.2d 121 (Utah 1986); State v. Hutchings, 672 P.2d 404 (Utah 1983); State v. Sparks, 672 P.2d 92 (Utah 1983); Cooper v. Jones, 657 P.2d 1372 (Utah 1983); In re Cluff, 587 P.2d 128 (Utah 1978); Ream v. Fitzer, 581 P.2d 145 (Utah 1978); Powers v. Gene's Building Materials, Inc., 567 P.2d 174 (Utah 1977); Watkins v. Simonds, 385 P.2d 154 (Utah 1963).

In this case, Young Electric Sign Company sought and obtained a Rule 54(b) certification that the lower court's granting of Marveon's summary judgment against Young Electric Sign Company was a final order. The record is absolutely devoid of any reference to insurance, yet at oral argument before this Court, Mr. Mohrman, YESCO's lawyer, suggested to the Court that Marveon, Inc. had insurance and that that was somehow relevant to the case. In Watkins v. Simonds, 385 P.2d 154 (Utah 1963), however, the Utah Supreme Court stated "this Court cannot consider facts stated in the briefs which may be true but absent in the official record." Id. at 155.

(Emphasis added.) Surely the same rule is applicable to counsel's oral argument on appeal.

How stringently the Utah Supreme Court has applied the rule that appeals must be based on the record developed below was demonstrated in Chapman v. Chapman, 728 P.2d 121 (Utah 1986), where the Court refused to overturn a summary judgment that clearly would have been defeated by Answers to Interrogatories and Answers to Requests for Admissions because the documents were not part of the record on appeal.

The record in this case simply does not support this Court's remand to the trial court to "determine an appropriate allocation between the two policies, with reference to the terms of Marveon's actual policy and the probable terms of the policy YESCO should have furnished."

POINT II

THE DAMAGE ISSUE RAISED SUA SPONTE BY THE COURT WAS NOT RAISED BELOW, WAS NOT LITIGATED, WAS NOT BRIEFED, AND WAS NOT BEFORE THE COURT.

The Appellate Courts of Utah have held at least 217 times, including 18 times in the last year, that issues may not be raised for the first time on appeal, but rather must be fully raised and litigated below. For example, as recently as February 2, 1989, in Ortiz v. Industrial Commission, 101 Utah

Adv. Rep. 60, to be reported at 766 P.2d 1092 (Utah App., Judges Davidson, Bench and Greenwood) Ortiz tried to argue on appeal that he was somehow forced to use a letter of a doctor rather than the doctor's testimony. The Court flatly rejected the argument, stating "We will not consider an issue raised for the first time on appeal." Id. at 61.

In Western Surety Co. v. Murphy, 754 P.2d 1237 (Utah App. 1988) (Judges Greenwood, Orme and Billings) Western Surety tried to argue on appeal that summary judgment below was inappropriately granted because a genuine issue of fact existed regarding whether damages should be offset by the value of the vehicle in question without title. The Court flatly rejected Western Surety's attempt, stating:

> Issues that are not raised before the trial court may not be raised for the first time on appeal . . . The issue of whether Curran's damages should be offset by the value of the car without title was not raised before the trial court. Therefore, this court will not consider the issue on appeal. Id. at 1240.

In this case, the issue this Court sua sponte chose to remand was not raised below, was not litigated below, and was not briefed on appeal. In fact, the only issue on appeal was stated by Young Electric Sign Company in Young Electric Sign Company's March 5, 1987 Docketing Statement, at page 4:

> ISSUE FOR REVIEW
>
> The defendant Young Electric Sign Company brings the following issue for review in this appeal:

1. Whether the language of the Purchase Agreement cited by defendant Marveon and its Motion for Summary Judgment is sufficient to require the defendant YESCO to indemnify and/or insure Marveon for its own negligence.

In fact, "damages" were an uncontested fact below. The very Order and Judgment appealed from, which was based on undisputed material facts, pursuant to a Motion for Summary Judgment, states:

> Judgment be, and hereby is entered in favor of Marveon and against YESCO that in the event any judgment is returned in favor of plaintiffs and against Marveon that Marveon is entitled to be indemnified by YESCO for the full amount of any such judgment up to one million dollars and that YESCO pay Marveon's costs and attorney's fees from an after the date of the tender of defense of Marveon to YESCO. (Emphasis added).

The lower court found that Marveon was entitled to full damages from YESCO, up to $1,000,000. No issue was raised below with respect to damages, nor was any issue with respect to damages preserved on appeal.

POINT III

THE COURT MISCONSTRUES THE ARIZONA CASE IT CITES - IN THAT CASE THE PARTY IN BREACH OF THE CONTRACTUAL PROVISION TO PROVIDE INSURANCE WAS REQUIRED TO PAY IN FULL.

At page 10 of the February 10, 1989 Opinion, this Court stated: "In an action for breach of contract to provide insurance, the measure of general damages, at least in cases

like the instant one, is the amount the policy would have paid had it been obtained." This court then cited for this proposition the case PPG Industries Inc. v. Continental Heller Corp., 124 Ariz. 216, 603 P.2d 108, 113-14 (Ariz. 1979). In PPG Industries Inc. v. Continental Heller Corp., however, the Arizona court, after discussing two similar, prior Arizona cases, reasoned that there was no reason why a party in breach of a contractual provision to provide insurance should be relieved of its unquestioned liability merely because the non-breaching party took the precaution of insuring itself against the risk of loss. The Arizona court further reasoned that payment to the non-breaching party by its own insurance was no defense to the subrogation claim against the breaching party "for the obvious reason that it is by the making of such payment that the insurer's right of subrogation arises." Id. at 113. In the earlier Arizona cases upon which the PPG Industries court based its decision, and in the PPG Industries case itself, the contractual agreement to provide insurance was enforced by the breaching party being required to pay the non-breaching party's insurers the amounts actually paid by the insurers. There was no remand for the trial court to "determine an appropriate allocation between the two policies . . . i.e., the non-breaching party's actual policy

and the probable terms of the policy the breaching party should have furnished."

POINT IV

AS A MATTER OF PUBLIC POLICY, THERE IS NO REASON WHY A PARTY IN BREACH OF A CONTRACTUAL PROMISE TO PROVIDE INSURANCE SHOULD GET THE FORTUITOUS WINDFALL OF THE NON-BREACHING PARTY'S PROPHYLACTIC ACTIONS.

The practical fact of the court's remand is to leave the door open for a party in breach of a contractual promise to provide insurance to partially, if not totally, get off the hook despite the breaching party's own breach. The Court provides no justification, and there seems to be none, for such a result. The practical consequence of the Court's remand is that the non-breaching party will potentially totally pay for the precise benefit that the breaching party promised to provide.

The February 10, 1989 Opinion wisely moved promises to provide insurance out from under the indemnification agreement, "strict construction" rule and into traditional contract analysis, yet the remand fails under traditional contract analysis. A debtor who breaches a promise to pay is not excused because the creditor is paid by the debtor's guarantor--the debtor remains fully liable to the guarantor. There is no sound reason why a violator of a promise to do an

act should escape all liability simply because of a fortuitous circumstance unrelated to the violator's acts, yet this is the result left open by the Court's remand.

POINT V

THE COURT'S REMAND WILL PRODUCE INCONSISTENT RESULTS FOR PARTIES IN BREACH OF CONTRACTUAL PROVISIONS TO PROVIDE INSURANCE, EVEN THOUGH SUCH PARTIES HAVE EACH BREACHED SUBSTANTIALLY SIMILAR CONTRACTUAL PROVISIONS TO PROVIDE INSURANCE.

The Court's remand will produce inconsistent and unjust results. Various parties who are in breach of contractual promise to provide insurance should be dealt with equally, and the consequence to the breaching party should not depend on a matter totally unconnected to the breaching party's conduct, i.e., whether the non-breaching party provided anywhere from no to full insurance coverage. Suppose three separate contracts, each containing a provision for one of the parties to the contract to provide insurance adequate to fully protect the other party. Suppose further that in each of the three separate contracts the party who promised to provide the insurance provides no insurance at all, and is thus in breach of the contractual promise to provide insurance. Suppose further that the other party to the first contract provides no insurance, the other party to the second contract provides

insurance that would contribute 50-50, and the other party to the third contract provides purely primary insurance. Apparently, the reasoning of this court is that the end result for the breaching parties in this scenario would be that the breaching party to the first contract would pay 100%, the breaching party to the second contract would pay 50%, and the breaching party to the third contract would pay nothing at all. In this case, even YESCO never argued for any such result. YESCO argued vigorously that it was not liable at all, but YESCO's entire theory of the case tacitly admitted that if it was liable at all, it was 100% liable. Stated simply, the law should require people to do what they have promised to do. Further, the law should treat each party who has breached a contractual promise to provide insurance the same way, and petitioner suggests that the appropriate way to treat such parties who have breached a contractual promise is to require them to fully pay for what they promised to provide.

CONCLUSION

For the foregoing reasons, Marveon Inc. hereby petitions this Court to rehear that portion of its February 10, 1989 Opinion remanding for further proceedings on damages, and further respectfully requests this Court to fully affirm the Order and Judgment of the lower court.

DATED this 22nd day of February, 1989.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Robert H. Henderson
Attorneys for Petitioner
Marveon, Inc.

SCMRHH353

CERTIFICATE OF SERVICE

I hereby certify that four copies of Marveon's Petition for Rehearing have been served by mail on each party or his counsel by mailing, first class, postage prepaid, on this 22nd day of February, 1989, to the following counsel of record:

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DATED this 22nd day of February, 1989.

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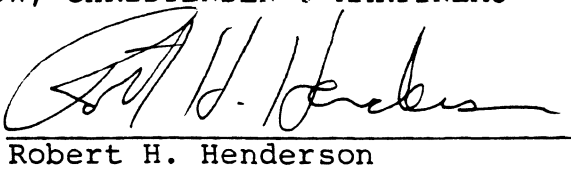
By 

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